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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON who are Members of Syndicate No. 553, as Subscribers to Contracts of Reinsurance with Transit Casualty Company, and C.J. Warrilow, an Underwriter at Lloyd's of London, Individually, and on behalf of Certain Underwriters at Lloyd's of London who are Members of Syndicate No. 553,

Petitioners,

v.

TRANSIT CASUALTY COMPANY IN RECEIVERSHIP,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does 28 U.S.C. §1447(d) forbid appellate review of a federal district court's decision that enforcement of an arbitration agreement falling under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards is barred by a state anti-arbitration law, just because the district court made that ruling in, and as a predicate for, an order remanding the case to state court, ostensibly pursuant to 28 U.S.C. §1447(c)?

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

Petitioners are certain Underwriters at Lloyd's, London, who through their membership in Lloyd's Syndicate No. 553 subscribed to reinsurance agreements with Transit Casualty Company identified in Respondent's pleadings as Quota Share Reinsurance Agreement effective December 1, 1978, Quota Share Reinsurance Agreement No. 7080/1/81 effective June 1, 1981, and First Casualty Quota Share Reinsurance Agreement No. 7080/1/84 effective January 1, 1984 and Interests and Liabilities Contract.

Respondent is the receivership of Transit Casualty Company, an insurance company organized and incorporated in Missouri. The company was declared insolvent in the Circuit Court of Cole County, Missouri in 1985 and placed in liquidation pursuant to the provisions of the Missouri insurance code.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Certain Underwriters at Lloyd's of London who are Members of Syndicate No. 553, as Subscribers to Contracts of Reinsurance with Transit Casualty Company respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in the above captioned case on July 10, 1997.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 119 F.3d 619 and is reprinted in the appendix ("App.") hereto at App. A1. The Judgment Order of the United States District Court for the Western District of Missouri is published and is reprinted at App. B1. The Memorandum Opinion and Order of the District Court is unpublished and is reprinted at App. C1.

JURISDICTION

The Court of Appeals filed its opinion on July 10, 1997. App. A1. The jurisdiction of this Court rests on 28 U.S.C. §1254.

PERTINENT STATUTORY PROVISIONS

Pertinent provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, are set forth at App. D1. Pertinent provisions of Chapter 2 of Title 9, U.S.C. (the Federal Arbitration Act), are set forth at App. E1-E2.

STATEMENT OF THE CASE

Respondent sued Petitioners in a Missouri state court for damages for breach of reinsurance agreements entered into between Petitioners and Transit Casualty Company. These reinsurance agreements contained broad arbitration clauses. App. A3-A4.

Petitioners moved to dismiss the suit on the ground that the arbitration agreements fell under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards and that the disputes raised by the Respondent's suit must be referred to arbitration pursuant to the Convention's terms. Petitioners then removed the action to the District Court for the Western District of Missouri pursuant to 9 U.S.C. §205, the removal provision of the legislation enacted by Congress to enforce the Convention, and sought an order from the District Court compelling arbitration and dismissal of the action. App. E2.

Respondent moved to remand the case to the state court on the grounds that the Petitioners had waived their right to remove, that the District Court lacked subject matter jurisdiction because the Convention was "reverse-pre-empted"[1] by Missouri's arbitration laws, that the District Court had no jurisdiction over two "show cause" orders issued by the state court, and that the District Court must abstain from exercising its jurisdiction under the *Burford* and *Colorado River* abstention doctrines. App. A5. On June 5, 1996, the District Court issued a final judgment remanding the action to the Missouri state court. App. B1.

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[1] By operation of the McCarran-Ferguson Act, 15 U.S.C. §§1011-1015.

On June 10, 1996, the District Court issued a Memorandum Opinion and Order explaining the grounds upon which its remand order was based. App. C1. The Court acknowledged that the Petitioners had removed the case under 9 U.S.C. §205 in order to compel Respondent to arbitrate and that "as a general rule the arbitration clauses contained in the reinsurance agreements at issue would be enforceable under the Convention and the Federal Arbitration Act." App. C2. However, the Court concluded that in this case the Petitioners' rights under the Convention were superseded by a provision of the Missouri Uniform Arbitration Act exempting arbitration agreements in insurance contracts from enforcement. App. C3. The District Court also accepted the Respondent's argument that a service of suit clause contained in the underlying reinsurance agreements should be interpreted as a waiver by the Petitioners of their right to remove the case to the federal courts pursuant to 9 U.S.C. §205. App. C6-C8.[2]

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[2] On July 9, 1996, the Governor of Missouri signed a law (Missouri H.B. No. 929) amending the section of the Missouri Uniform Arbitration Act that the District Court had found pre-empted Petitioners' federal right to arbitration to expressly exclude arbitration agreements in reinsurance contracts from its operation. On June 18, 1997—13 days after the case was remanded to it—the state court allowed Respondent to file a Second Amended Petition and Motion for Order to Show Cause against Petitioners based on the same reinsurance agreements. Petitioners moved to compel arbitration of the Respondent's claims and to dismiss or stay the judicial action. The state court decided the motion the next day, denying the motion to compel on the grounds that a service of suit clause in the reinsurance agreements superseded the arbitration clause and that the Missouri Insurers Liquidation Act

(continued...)

Petitioners immediately appealed the District Court's order to the Eighth Circuit, invoking two grounds for appellate jurisdiction: 9 U.S.C. §16, which expressly authorizes appeal of orders denying petitions to compel arbitration and the collateral order doctrine, under which the District Court's denial of Petitioner's petition to compel arbitration is treated as final for purposes of 28 U.S.C. §1291. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) and *Quackenbush v. Allstate Ins. Co.*, ___ U.S. ___, 116 S.Ct. 1712 (1996).[3] Respondent filed a motion to dismiss the appeal based on the ground that the Court had no appellate jurisdiction because the District Court's remand was based on a lack of subject matter jurisdiction. The Court of Appeals denied the motion. App. A9.

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[2] (...continued)
(§375.1188, RSMo.) prohibited Petitioners' motion to compel arbitration. Petitioners have appealed that ruling to the Missouri Court of Appeals.

[3] In August of 1997, Respondent filed another action in the same state court against Petitioners and the members of nine other Lloyd's syndicates seeking substantially the same relief with respect to a different set of reinsurance agreements. Petitioners again removed the action to the United States District Court for the Western District of Missouri pursuant to 9 U.S.C. §205, and District Judge Fernando J. Gaitan, Jr., characterizing the case as a companion to the instant case that presented substantially the same issues, remanded the case to the state court. *Transit Casualty Company in Receivership v. Certain Underwriters at Lloyd's*, U.S.D.C., W.D. Mo. Cause No. 96-4386-CV-6-2 (September 23, 1997). This time, however, the District Court ruled that the Missouri Insurers Liquidation Act barred a petition to compel arbitration under the Convention. The District Court did not base its remand order on 28 U.S.C. §1447(d) nor did it make a finding that it lacked subject matter jurisdiction on removal.

As grounds for reversal by the Eighth Circuit, Petitioners argued that the McCarran-Ferguson Act does not encompass the interpretation or operation of the Convention or its enforcing legislation, and that the reinsurance agreements in question could not be interpreted as waiving Petitioners' rights under 9 U.S.C. §205. The Eighth Circuit did not reach the merits of Petitioners' appeal. Characterizing the District Court's holding that "there clearly exists a state statute which precludes the enforcement of arbitration in insurance contracts" (App. C6) as a finding that the court lacked subject matter jurisdiction on removal, the Eighth Circuit concluded that it lacked appellate jurisdiction to review the order by virtue of 28 U.S.C. §1447(d), which blocks review of district court remand orders based on findings of lack of subject matter jurisdiction. The Court of Appeals viewed the District Court's opinion on the question of whether the service of suit clause in the reinsurance agreements constituted a waiver of the right to remove by Petitioners as immaterial to the remand order or its reviewability, reasoning that "[o]nce the district court determined that the Convention did not apply and therefore removal jurisdiction was lacking, there was no need to rule on the receivership's contention that the underwriters had contractually waived any removal rights." App. A16.

REASONS FOR GRANTING THE WRIT

I.

The Eighth Circuit's conclusion that 28 U.S.C. §1447(d)[4] deprives it of jurisdiction to review the District Court's extraordinary ruling that the Missouri Uniform Arbitration Act pre-empted enforcement of Petitioners' rights under an international treaty flies in the face of this Court's decision in *Waco v. United States Fidelity & Guaranty Co.*, 293 U.S. 140 (1934). In *Waco*, this Court held that rulings made as predicates for remands for lack of removal jurisdiction are not immune to review simply because they are combined with the order of remand. Noting that the district court in *Waco* had remanded for lack of diversity removal jurisdiction only after it had favorably ruled on a motion to dismiss the only diverse party as an unnecessary and improper party, this Court said:

> [I]f the District Court was right, the cause could not have been remanded except for the exclusion of the . . . [improper party]. True, no appeal lies

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[4] Section 1447(d) provides:

> (d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

In *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976), this Court held that Section 1447(d) applies only to remands made pursuant to subsection (c) of Section 1447, which now provides, in pertinent part, that "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded."

> from the order of remand; but in logic and in fact the decree of dismissal preceded that of remand and was made by the District Court while it had control of the cause.

Id. at 143. A number of courts have resolved issues of reviewability on the principles of *Waco* in cases where a district court's remand order was based on a resolution of the merits of some matter of substantive law. *See, e.g., Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273 (9th Cir. 1984); *Clorox Co. v. U.S. District Court*, 779 F.2d 517 (9th Cir. 1985); *Foster v. Chesapeake Ins. Co.*, 933 F.2d 1207 (3d Cir. 1991); *In re Delta America Re Ins. Co.*, 900 F.2d 890 (6th Cir. 1990); *Karl Koch Erecting Co., Inc. v. New York Convention Center Development Corp.*, 838 F.2d 656 (2d Cir. 1988); *In re TMI Litigation Cases*, 940 F.2d 832 (3d Cir. 1991).

In the case at bar, the Court of Appeals recognized that the reference to 28 U.S.C. §1447(c) in the District Court's memorandum opinion was "somewhat ambiguous",[5] and acknowledged its responsibility under such circumstances to look past textually ambiguous allusions and even specific citations to Section 1447(c) and independently determine the actual grounds or basis for the District Court's decision to remand the action. App. A12. The flaw in the Eighth Circuit's independent conclusion that the remand order was based on a lack of removal jurisdiction lies in its failure to recognize that a district court's jurisdiction to entertain a petition to enforce an arbitration agreement under the Convention and the

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[5] The remand order itself, issued five days before the memorandum opinion, made no mention of Section 1447(d) or (c). App. B1.

petitioner's entitlement to the relief sought are separate and distinct questions.

Congress has invested the district courts with original jurisdiction over actions involving arbitration agreements that "fall under" the Convention, 9 U.S.C. §203, and has specified that an agreement "falls under" the Convention if it "aris[es] out of a legal relationship . . . considered as commercial . . ." and one of the parties is not a citizen of the United States, or the relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. 9 U.S.C. §202. Whether a district court must exercise that jurisdiction to compel a party to the agreement to perform under the agreement is a different question, dependent upon different facts: whether the agreement "is null and void, inoperative or incapable of being performed"[6] and whether the dispute sought to be arbitrated falls within the scope of the parties' arbitration agreement.[7] A number of federal courts have recognized that adjudication of a petition to compel arbitration involves this two step analysis. *See, e.g., Severonickel v. Gaston Reymenants*, 115 F.3d 265 (4th Cir. 1997); *Jain v. de Mere*, 51 F.3d 686 (7th Cir. 1995); *Ledee v. Ceramiche Ragno*, 684 F.2d 184 (2d Cir. 1982);

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[6] Convention, Art. II, ¶3. App. D1.

[7] 9 U.S.C. §§3 and 4, which apply to enforcement of arbitration agreements falling under the Convention by virtue of their incorporation in the Convention enforcement provisions of Ch. 2 of Title 9 by 9 U.S.C. §208. Section 3 requires a court to stay its proceedings if it is satisfied that an issue before it is arbitrable under the agreement and §4 requires a court to direct the parties to arbitration upon being satisfied that the making of the arbitration agreement is not in issue.

Quasem Group, Ltd. v. W.D. Mask Cotton Co., 967 F.Supp. 288, 293 (W.D. Tenn. 1997).

There is no question that the arbitration agreements at issue in this case fall under the Convention within the meaning of Section 202, and the District Court's opinion bears no hint to the contrary.[8] The District Court's determination that Petitioners were not entitled to an order compelling arbitration clearly rested, not on any failure to satisfy the jurisdictional requirements of Section 202, but upon the court's conclusion that *enforcement* of the Convention was pre-empted by a state statute. The District Court undeniably exercised the subject matter jurisdiction granted it by Congress in 9 U.S.C. §203 to decide whether or not the case was arbitrable—and concluded that it was not. The conclusions of law upon which the District Court predicated its remand order go directly to the merits of the Petitioners' claim that they were entitled to an order under the Convention Act referring this case to arbitration, and the Court fully and finally decided that claim against them.

The authorities cited by the Eighth Circuit in support of its conclusion that the District Court's finding was jurisdictional in nature do not support the court's reasoning. Three of those decisions[9] involved situations

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[8] Indeed, as noted above, the Court acknowledged that "[a]s a general rule, the arbitration clauses contained in the reinsurance agreement at issue would be enforceable under the Convention and the Federal Arbitration Act and would preempt Missouri statutes under the supremacy clause." App. C3.

[9] *Whitman v. Raley's, Inc.* 886 F.2d 1177 (9th Cir. 1989); *J. W. Soley v. First Nat'l Bank of Commerce*, 923 F.2d 406 (5th Cir. 1991); *Baldridge v. Kentucky-Ohio Transp. Inc.*, 983 F.2d 1341 (6th Cir. 1993).

where a case removed pursuant to the District Court's general federal question jurisdiction was remanded because the federal question was raised by way of defense and the court found that it had no jurisdiction under any of the exceptions to the well-pleaded complaint rule. Normally, a complaint may not be removed from state court to federal court unless it could originally have been filed in federal court. 28 U.S.C. §§1331, 1441; *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987). Under the well-pleaded complaint rule, federal question jurisdiction only exists if the federal question is presented on the face of the complaint. *Caterpillar*, 482 U.S. at 392. A case may not be removed on the basis of a federal defense, such as pre-emption, even if the defense is anticipated in the complaint and both parties concede that it is the only question at issue. *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 12 (1983). The courts have recognized an exception to the rule in cases where a complaint pleads state law claims that have been completely pre-empted by Congress. *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987).

The fourth case[10] cited by the Court was removed on diversity grounds and remanded when the court determined that complete diversity did not exist because a nondiverse party who had been voluntarily dismissed was still deemed a party by operation of a state statute. In each of these four cases, the predicate question decided by the District Court to reach its decision to remand truly was also determinative of the court's lack of subject matter jurisdiction at the time the case was removed, whereas, as shown above, in the instant case

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[10] *Carney v. BIC Corp.*, 88 F.3d 629 (8th Cir. 1996).

the predicate question decided by the court was distinct from the question of its subject matter jurisdiction. The instant case was removed, not on the basis of diversity or federal question jurisdiction, but pursuant to a removal statute expressly providing that the grounds for removal jurisdiction "need not appear on the face of the complaint." 9 U.S.C. §205.

II.

The Convention embodies the policy of the United States with regard to agreements to resolve international commercial disputes by arbitration. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 517 n.10 (1974) ("[t]he goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements and international contracts and to unify the standard by which the agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries."); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985). Chapter 2, which was added to Title 9 of the U.S. Code to make arbitration agreements comprehended by the Convention enforceable in the federal courts as a matter of federal substantive law, *Perry v. Thomas*, 482 U.S. 483 (1987); *Scherk v. Alberto-Culver, supra*; *Southland Corp. v. Keating*, 465 U.S. 1 (1984), creates a strong presumption in favor of arbitration, especially in international commercial agreements. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* 473 U.S. at 638-40. Chapter 2 supplanted widely varying, and usually hostile, state arbitration laws—a necessity if the United

States were to guarantee the nationwide uniformity of enforcement demanded of nations acceding to the Convention. *See* Aksen, *American Arbitration Accession Arrives in the Age of Aquarius: United States Implements United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 3 SW.U.L. REV. 1, 18 (1971).

The Eighth Circuit recognized the national policy served by the Convention (App. A4) but nonetheless concluded that it was helpless to review the District Court's finding that a state statute prevents enforcement of the Convention in this case, because 28 U.S.C. §1447(d) prohibits appellate review of remands for want of federal subject matter jurisdiction. Section 1447(d) reflects a policy disfavoring the interruption of the litigation of the merits of a removed cause by prolonged litigation of questions of jurisdiction of the District Court to which the cause is removed. *United States v. Rice*, 327 U.S. 742 (1946); *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976). The Eighth Circuit's ruling draws that policy into direct conflict with the strong national policy favoring enforcement of international arbitration agreements described by this Court in its *Scherk* and *Mitsubishi* decisions and undermines the ability of the United States to discharge its obligations as a signatory to the Convention, as well.

It is not reasonable to think that Congress intended Section 1447(d) to preclude appellate review of a district court ruling that a state statute bars enforcement of an international treaty and thereby to exclude from appellate review an entire category of district court decisions that subordinate the strong national policy favoring in-

ternational commercial arbitration agreements to state anti-arbitration laws.

III.

The Courts of Appeals have taken widely varying and sometimes inconsistent approaches to determining whether a substantive ruling upon which a remand order is predicated is reviewable on appeal, especially where the remand order ostensibly is based on a lack of subject matter jurisdiction. Although it is difficult to classify the many opinions that have grappled with this problem,[11] the extremes appear to be represented by the view, on the one hand, that the only remand orders made unreviewable by Section 1447(d) are those based on a finding that the removed action was not one Congress intended to be tried in federal court and, on the other hand, by the view that when a district court states that a remand order is issued pursuant to Section 1447(c), it is beyond all appellate review, no matter how erroneous the substantive findings upon which it is based might be. In between, lie decisions declining to review remand orders if a district court "believed" that it had no subject matter jurisdiction and decisions distinguishing between remands based on a district court's belief that no jurisdiction existed at the time of remand and those based on a

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[11] "While the language seems straightforward, analysis of §1447(d) is not simple and its bar is not absolute . . . 'straightforward' is about the last word judges attach to §1447(d) these days." *Trans Penn Wax Corp. v. McCandless*, 50 F.3d 217, 222 (3d Cir. 1995) (*quoting In re Amoco Petroleum Additives Co.*, 864 F.2d 706, 708 (7th Cir. 1992). Decisions from a number of Circuits are surveyed in *Baldridge v. Kentucky-Ohio Transport, Inc.*, 983 F.2d 1341 (6th Cir. 1993).

belief that a subsequent development in the case destroyed subject matter jurisdiction.

The view that the congressional intent underlying Section 1447(c) and (d) is the key to determining reviewability is represented by the Third Circuit's decision *In re TMI Litigation*, 940 F.2d 832, 845 (3d Cir. 1991) (In order to fall within Sections 1447(c) and 1447(d), a remand order must be based upon a finding that removal was not authorized by Congress). The more restrictive view is represented by the Sixth Circuit's opinion in *Anusbigian v. Trugreen/Chemlawn, Inc.*, 72 F.3d 1253 (6th Cir. 1996) (If a district court determines, rightly or wrongly, that it lacks subject matter jurisdiction over a removed case, the court of appeals lacks jurisdiction to review its remand order). *See, also, Powers v. Southland Corp.*, 4 F.3d 223 (3d Cir. 1993) (disagreeing with *Tillman v. CSX Transp., Inc.*, 929 F.2d 1023 (5th Cir. 1991) and, to some extent, with *Washington Suburban Sanitary Comm'n v. CRS Sirrine, Inc.*, 917 F.2d 834 (4th Cir. 1990) on the proper interpretation of this Court's decision in *Waco*); *Gonzales-Garcia v. Williamson Dickie Manufacturing Co.*, 99 F.3d 490 (1st Cir. 1996) (disagreeing with *Tingey v. Pixley-Richards West, Inc.*, 953 F.2d 1124 (9th Cir. 1992)).

Until this Court provides some direction to the district courts responsible for fashioning remand orders, and the Courts of Appeals who now mechanistically apply Section 1447(d) in determining the reviewability of such orders, significant questions of substantive federal law, upon which Congress did not intend the district courts to have the last word, will never see the light of appellate review. As long as substantive rulings on federal law and policy with respect to international commercial arbitra-

tion go unreviewed on the Eighth Circuit's rationale in the instant case, the United States' ability to comply with its commitment under the Convention to "federalize" judicial enforcement of the Convention will remain seriously in doubt.

CONCLUSION

For the reasons stated herein, this Court should grant the writ and reverse the decision below.

Respectfully submitted,

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APPENDICES

APPENDIX A

119 F.3d 619

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-2532

Transit Casualty Company, in Receivership, Appellee, v. Certain Underwriters at Lloyd's of London, who are members of Syndicate No. 553, As subscribers to contracts of Reinsurance with Transit Casualty Company; C.J. Warrilow, An Underwriter at Lloyd's of London, individually, and on Behalf of Certain Underwriters at Lloyd's of London Who are Members of the Syndicate No. 553, Appellants.	*	Appeal from the United States District Court for the Western District of Missouri
The Reinsurance Association of America, Amicus Curiae.	*	

Submitted: November 18, 1996

Filed: July 10, 1997

Before McMILLIAN, Circuit Judge,
HENLEY, Senior Circuit Judge, and
MORRIS SHEPPARD ARNOLD, Circuit Judge.

McMILLIAN, Circuit Judge.

Plaintiff Transit Casualty Company, in Receivership (the receivership), originally filed, in Missouri state court, a petition and motion for order to show cause based upon the failure to pay reinsurance recoveries and the interference with the liquidation of Transit Casualty Company (Transit) by certain underwriters at Lloyd's of London who are members of Syndicate No. 553 in London (the underwriters). The underwriters subsequently removed the case to federal district court. The underwriters now appeal from a final order entered in the United States District Court[1] for the Western District of Missouri remanding the cause of action to the state court and denying their motion to stay the execution of the remand order. *Transit Cas. Co., in Receivership v. Certain Underwriters at Lloyd's of London*, No. 96-4173-CV-C-2 (W.D. Mo. June 10, 1996). For reversal, the underwriters argue the district court erred in holding that (1) Missouri's arbitration laws govern this case and (2) the service of suit clause contained in the parties' reinsurance agreements waived the underwriters' right to remove this cause of action. For the reasons discussed below, we dismiss the appeal pursuant to 28 U.S.C. § 1447(d) for lack of jurisdiction.

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[1] The Honorable Fernando J. Gaitan, Jr., District Judge, United States District Court for the Western District of Missouri.

I. Background

Transit is an insurance company which was organized and incorporated in 1945 under the laws of Missouri. On December 3, 1985, the Circuit Court of Cole County, Missouri, acting as the receivership court, declared Transit insolvent and ordered liquidation pursuant to Mo. Rev. Stat. § 375.660 (1994). The receivership is proceeding with the liquidation of Transit and has approved certain claims on policies issued by Transit and reinsured by certain Lloyd's of London underwriters who, as members of Syndicate No. 553, subscribed to contracts of reinsurance with Transit.

On February 21, 1996, the receivership filed a petition and motion to show cause in the state court, alleging that the underwriters owe Transit $1,431,856.76 under three separate reinsurance agreements which became effective on December 1, 1978, January 1, 1981, and January 1, 1984. On May 6, 1996, the underwriters removed the case to federal district court pursuant to 9 U.S.C. § 205 (1994), which permits removal, before trial, of an action that relates to an arbitration agreement or award governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the Convention), June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, *reprinted in* 9 U.S.C.A. § 201 note (West Supp. 1997). The underwriters sought to compel Transit to arbitrate its claims in accordance with an arbitration clause contained in the reinsurance agreements:

> Art. XXII—Arbitration Clause
>
> All disputes or differences arising out of this Agreement shall be submitted to the decision of two Arbitrators, one to be chosen by each party,

> and in the event of the Arbitrators failing to agree, to the decision of the Umpire to be chosen by the Arbitrators.

The goal of the Convention is to facilitate and stabilize international business transactions by promoting the enforcement of arbitral agreements in contracts involving international commerce. *Threlkeld & Co. v. Metallgesellschaft Ltd. (London)*, 923 F.2d 245, 248, 250 (2d Cir.), *cert. dismissed*, 501 U.S. 1267 (1991). An arbitration agreement or arbitral award falls under the Convention if it "aris[es] out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in [9 U.S.C. § 2]." 9 U.S.C. § 202.

When Congress amended the Federal Arbitration Act (the FAA)[2] in 1970 to implement the Convention,[3] it included the removal provision on which the underwriters based their petition for removal:

> Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention [on Recognition and Enforcement of Foreign Arbitral Awards], the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending. The procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal

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[2] 9 U.S.C. §§ 1-307 (1994).

[3] 9 U.S.C. §§ 201-208 (1994).

> provided in this section need not appear on the face of the complaint but may be shown in the petition for removal.

9 U.S.C. § 205. In seeking to compel arbitration of the dispute, the underwriters relied on 9 U.S.C. § 206, which provides that "a court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States. Such court may also appoint arbitrators in accordance with the provisions of the agreement."

On May 20, 1996, the receivership filed a motion in the district court to remand the case to state court on the grounds that: (1) the service-of-suit clause contained in the parties' reinsurance agreements waives the underwriters' right of removal; (2) removal was defective; (3) the district court lacks subject matter jurisdiction because, under the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (1994), Missouri's arbitration laws supersede the Convention; (4) the district court lacks subject matter jurisdiction over two show cause orders issued by the state court *sui generis*; and (5) the district court must abstain under the *Burford*[4] and *Colorado River*[5] abstention doctrines. On June 5, 1996, the district court granted the receivership's motion for remand. *Transit Cas. Co., in Receivership v. Certain Underwriters at Lloyd's of London*, No. 96-4173-CV-C-2 (W.D. Mo. June 5, 1996). In its June 5, 1996, order, the district court

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[4] *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

[5] *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976).

indicated that it would issue a supporting memorandum on or before June 10, 1996.[6] *Id.* On June 6, 1996, the underwriters filed a motion to stay the execution of the remand pending their appeal of the remand order. On June 10, 1996, the district court issued its memorandum opinion and order. *Transit Cas. Co., in Receivership v. Certain Underwriters at Lloyd's of London*, No. 96-4173-CV-C-2 (W.D. Mo. June 10, 1996) (hereinafter "slip op."). While the receivership presented a multitude of arguments for remanding this cause of action, the district court relied on only two reasons for granting the remand. Because the basis of the remand is dispositive of this court's ability to review the district court's order, we discuss in detail the district court's analysis.

In the district court, the receivership relied in part on Missouri's Uniform Arbitration Act, which provides that written agreements to arbitrate disputes are valid, enforceable, and irrevocable, except in contracts of insurance and contracts of adhesion. Mo. Rev. Stat. § 435.350 (1994). The receivership posited that Missouri's arbitration statute is not preempted by the FAA or the Convention because the McCarran-Ferguson Act preserves state statutes enacted "for the purpose of regulating the business of insurance" and excepts them from the usual rules of preemption. 15 U.S.C. § 1012(b). The McCarran-Ferguson Act provides that "[n]o Act of Congress shall be construed to invalidate, impair or supersede any law

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[6] The district court also denied the underwriters' motions for a temporary restraining order and a preliminary injunction relating to a motion for contempt filed by the receivership in state court. The contempt motion is not relevant to this appeal; we therefore do not address it.

enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance." *Id.* The receivership maintained that because neither the Convention nor the FAA specifically relates to the business of insurance, neither preempts Missouri's arbitration statute.

In determining whether the Missouri arbitration statute is saved from preemption by the McCarran-Ferguson Act, the district court considered: first, whether the federal statutes specifically relate to the business of insurance; second, whether the state law at issue was enacted for the purpose of regulating the business of insurance; and third, whether the application of the federal laws invalidates, impairs, or supersedes the state law. Slip op. at 3, *citing United States Dep't of Treasury v. Fabe*, 508 U.S. 491[, 501] (1993) (the McCarran-Ferguson Act reverses the normal rules of preemption by imposing a rule that state laws enacted "for the purpose of regulating the business of insurance" do not yield to conflicting federal statutes unless a federal statute specifically requires otherwise); *see also Murff v. Professional Med. Ins. Co.*, 97 F.3d 289, 291 (8th Cir. 1996) (applying same three-part test), *cert. denied*, 65 U.S.L.W. 3572 (U.S. June 16, 1997) (No. 96-1252). Both parties agreed that neither the FAA nor the Convention specifically relates to the business of insurance. Slip op. at 3. The district court then determined that the Missouri arbitration statute was enacted for the purpose of regulating the business of insurance because it is aimed at protecting or regulating the performance of an insurance contract. *Id.* at 4-5. It further found that the application of the Convention to the parties' reinsurance agreements would impair, invalidate, and supersede the Missouri

arbitration statute which expressly proscribes the enforcement of arbitration provisions contained in contracts of reinsurance.[7] *Id.* at 5. Accordingly, the district court concluded that Missouri's arbitration statute precludes the enforcement of the arbitration clause in the reinsurance agreements. *Id.*

The receivership also argued that remand was appropriate because the underwriters waived their right of removal based on the service-of-suit clause contained in the parties' reinsurance agreements:

> Art. XVII—Service of Suit Clause
>
> In the event of the failure of the Reinsurer to pay an amount claimed to be due hereunder, the Reinsurer will, at the request of the Reinsured, submit to the jurisdiction of any court of competent jurisdiction within the United States and will comply with all requirements necessary to give such Court jurisdiction and all matters arising hereunder shall be determined in accord with the law and practice of such Court.
>
> [I]n any suit instituted against the Reinsurer under this Agreement the Reinsurer will abide by the final decision of such Court or of any reviewing Court.

The district court held that, as a matter of contract interpretation, the service-of-suit clause waived the underwriters' right to remove. *Id.* at 6. The district court interpreted the clause to provide that, by consenting to

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[7] The district court "decline[d] to make a distinction in this case between contracts of insurance and reinsurance." Slip op. at 4, *citing Mutual Reins. Bureau v. Great Plains Mut. Ins. Co.*, 969 F.2d 931 (10th Cir.), *cert. denied*, 506 U.S. 1001 (1992).

submit to any court of competent jurisdiction at the request of the reinsured, the underwriters agreed to go to, and stay in, the forum chosen by the receivership, which was the state court. *Id.* at 7, *citing Foster v. Chesapeake Ins. Co.*, 933 F.2d 1207, 1217 (3d Cir.) (holding that a similar service-of-suit clause waived the defendant's right to remove), *cert. denied*, 502 U.S. 908 (1991). The district court interpreted the parties' reinsurance agreements to give equal effect to both the arbitration clause and the service-of-suit clause and held that a reasonable reading of the contract required the underwriters to submit to the jurisdiction of any court of competent jurisdiction chosen by the receivership, "whether it be to determine the arbitrable nature of the dispute, to confirm an arbitration award, to compel arbitration, or to resolve on the merits a claim not subject to arbitration." *Id.* at 8.

The district court held that remand was appropriate and denied the underwriters' motion to stay the execution of the remand order. *Id.* This appeal followed.

II. Discussion

As a preliminary matter, we consider whether this court has jurisdiction to review the district court's remand order.[8] Title 28 U.S.C. § 1447(d) (1994) provides that, with the exception of civil rights cases, "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." The Supreme Court has narrowly construed this restriction,

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[8] The receivership previously filed a motion to dismiss this lack of jurisdiction, which this court summarily denied on July 12, 1996.

however, and explained that only cases remanded under 28 U.S.C. § 1447(c) are subject to this nonreviewability provision. *Quackenbush v. Allstate Ins. Co.*, 116 S.Ct. 1712, 1718 (1996) (*Quackenbush*); *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 346 (1976) (*Thermtron*). Under § 1447(c), the district court must remand the case if any defect in removal procedure is timely raised or "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction." 28 U.S.C. § 1447(c) (1994).[9] Where the district court's remand order is based upon § 1447(c), review of that remand order is prohibited "whether erroneous or not and whether review is sought by appeal or by extraordinary writ." *Thermtron*, 423 U.S. at 343; *see also Gravitt v. Southwestern Bell Tel. Co.*, 430 U.S. 723 (1977) (per curiam); *In re Business Men's Assurance Co. of Am.*, 992 F.2d 181, 182 (8th Cir. 1993) (per curiam) (rule that remand order issued under § 1447(c) is unreviewable applies "whether or not that order might be deemed erroneous by an appellate court"). Thus, if the district court believed that it lacked subject matter jurisdiction at the time of removal, review of the remand order is barred under § 1447(d). *In the Matter of Amoco Petroleum Additives Co.*, 964 F.2d 706, 708 (7th Cir. 1992).

The underwriters argue that this court may review the district court's order under 28 U.S.C. § 1291 (1994), which confers jurisdiction over appeals from "final decisions" of the district courts. They characterize the dis-

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[9] At the time the Supreme Court decided *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336 (1976), § 1447(c) provided that "[i]f at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case."

trict court's order as a denial of arbitrability and, as such, contend that it falls within

> a narrow class of collateral orders which do not meet this definition of finality, but which are nevertheless immediately appealable under § 1291 because they conclusively determine a disputed question that is completely separate from the merits of the action, effectively unreviewable on appeal from a final judgment, and too important to be denied review.

Brief for Appellant at 10-11, *quoting Quackenbush*, 116 S.Ct. at 1718-19 (citations omitted). The underwriters alternatively argue that this court may review the district court's remand order under 9 U.S.C. § 16(a)(1)(B), (C) (1994), which expressly authorizes appeal of orders denying petitions to compel arbitration. On the merits, the underwriters, concluding that the district court's remand order was based on abstention principles, argue that abstention is improper in this case because the federal interests in this case are pronounced and, furthermore, because federal courts may remand a case based on abstention principles only where the relief being sought is equitable or otherwise discretionary, whereas the receivership is seeking money damages. *Id.* at 12, *citing Quackenbush*, 116 S.Ct. at 1727-28.

We disagree with the underwriters' characterization of the district court's remand order and interpret the order as holding that it lacked subject matter jurisdiction and remanding on that basis. Specifically, the district court held that "[i]n the present action, there clearly exists a state statute which precludes the enforcement of arbitration in insurance contracts." Slip op. at 5. The district court determined that the McCarran-Ferguson Act's in-

verse-preemption prevented the parties' reinsurance agreements from governance by the Convention. Because the parties' reinsurance agreements must fall under the Convention in order for the underwriters to remove under 9 U.S.C. § 205, the district court's finding that the Convention does not apply to this cause of action resulted in a lack of removal jurisdiction and necessitated remand. *See Whitman v. Raley's Inc.*, 886 F.2d 1177, 1181 (9th Cir. 1989) ("A remand based on lack of 'complete preemption' [under ERISA] is a remand required by 28 U.S.C. § 1447(c).").

Furthermore, the district court cited 28 U.S.C. § 1447(c) in its order granting the receivership's motion for remand. *See* slip op. at 2. We reject the underwriters' contention that, although cited by the district court, neither ground contained in § 1447(c) was the actual basis for remand. *See Mangold v. Analytic Servs., Inc.*, 77 F.3d 1442, 1450 (4th Cir. 1996) (appellate court has power and responsibility to look past contextually ambiguous allusions and even specific citations to § 1447(c) to determine by independent review of the record the actual grounds or basis upon which the district court considered it was empowered to remand). Because the district court's citation to § 1447(c) was somewhat ambiguous in that the district court simply recited the statute without expressly relying on it, slip op. at 2, we will look past the district court's reference to § 1447(c). In so doing, we determine that the true basis for the district court's decision to remand was a lack of removal jurisdiction. *See Baldridge v. Kentucky-Ohio Transp., Inc.*, 983 F.2d 1341, 1350 (6th Cir. 1993) (interpreting district court's remand order as jurisdictional and falling within § 1447(c); thus, barring appellate review under

§ 1447(d)); *Soley v. First Nat'l Bank of Commerce*, 923 F.2d 406, 410 (5th Cir. 1991) (same).

This case is analogous to *Carney v. BIC Corp.*, 88 F.3d 629, 632 (8th Cir. 1996), *cert. denied*, 117 S.Ct. 738 (1997), in which this court held that the district court's remand for lack of removal jurisdiction was unreviewable under § 1447(d). In *Carney v. BIC Corp.*, the district court applied a Missouri dismissal statute in ruling that the parties were not diverse and, thus, removal jurisdiction did not exist. *Id.* This court held that the district court's consideration of Missouri's dismissal statute in concluding that the parties were not diverse was in no way separate from the jurisdictional determination. *Id.* Similarly, in the present case, the district court's consideration of Missouri's arbitration statute in concluding that the parties' reinsurance agreements are not subject to the Convention was necessary to determine whether removal jurisdiction existed. Furthermore, because the district court remanded for a lack of subject matter jurisdiction, it lacked jurisdiction to make any substantive rulings, and, thus, "no rulings of the federal court have any preclusive effect on the substantive matters before the state court." *Whitman v. Raley's Inc.*, 886 F.2d at 1182; *cf. In re Life Ins. Co. of N. Am.*, 857 F.2d 1190, 1193 (8th Cir. 1988) (because the district court had jurisdiction over the subject matter and the parties, its ruling that ERISA did not preempt the state claim would be binding on the state court "as res judicata and the law of the case").[10]

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[10] Several circuits have read *In re Life Ins. Co. of N. Am.*, 857 F.2d 1190 (8th Cir. 1988), as holding that a district court's

(continued...)

The fact that the underwriters removed this case under 9 U.S.C. § 205 rather than under the general removal statutes, 28 U.S.C. §§ 1441-1452, does not change the result that the district court's remand order is unreviewable. General removal law applies to cases which are removed under the Convention's removal provision because § 205 incorporates the "procedure for removal of causes otherwise provided by law," which means 28 U.S.C. §§ 1441-1452. *In the Matter of Amoco Petroleum Additives Co.*, 964 F.2d at 712. In particular, this language includes § 1447(c), authorizing remand for defects in the removal procedure, and § 1447(d), blocking appellate review of remands issued under § 1447(c). 964 F.2d

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[10] (...continued)
findings incident to an order of remand have a preclusive effect on the state court, and they have explicitly rejected that holding. *See, e.g., Gonzalez-Garcia v. Williamson Dickie Mfg. Co.*, 99 F.3d 490, 492 (1st Cir. 1996); *Nutter v. Monongahela Power Co.*, 4 F.3d 319, 322 (4th Cir. 1993); *Baldridge v. Kentucky-Ohio Transp., Inc.*, 983 F.2d 1341, 1347-50 (6th Cir. 1993); *Soley v. First Nat'l Bank of Commerce*, 923 F.2d 406, 409 (5th Cir. 1991); *Whitman v. Raley's Inc.*, 886 F.2d 1177, 1181 (9th Cir. 1989); *Glasser v. Amalgamated Workers Union Local 88*, 806 F.2d 1539, 1540-41 (11th Cir. 1986) (per curiam). Those courts have failed to recognize, however, that the district court in *In re Life Ins. Co. of N. Am.* did not issue its remand order pursuant to 28 U.S.C. § 1447(c), but rather exercised its discretionary power to remand a pendent state law claim after all federal claims had been eliminated. 857 F.2d at 1193 n. 1, *citing Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343 (1988). Because the district court had pendent jurisdiction over the remanded state law claim, its adjudication of the preemption issue was binding on all other courts, subject only to the appellate process. *Id.* at 1193, *citing United States ex rel. Lawrence v. Woods*, 432 F.2d 1072, 1076 (7th Cir. 1970), *cert. denied*, 402 U.S. 983 (1971).

at 712; *LaFarge Coppee v. Venezolana De Cementos, S.A.C.A.*, 31 F.3d 70, 71 (2d Cir. 1994).

> Section 1447(d) applies not only to remand orders made in suits removed under the general removal statute, but to orders of remand made in cases removed under any other statutes, as well. Absent a clear statutory command to the contrary, we assume that Congress is aware of the universality of the practice of denying appellate review of remand orders when Congress creates a new ground for removal.

Things Remembered, Inc. v. Petrarca, 116 S.Ct. 494, 497 (1995) (emphasis in original) (citations omitted). Giving effect to both 28 U.S.C. § 1447(d) and 9 U.S.C. § 205, the remand order at issue is not reviewable on appeal. *See* 116 S.Ct. at 497. Moreover, this court has held that a district court is required to resolve all doubts about federal jurisdiction in favor of remand. *In re Business Men's Assurance Co. of Am.*, 992 F.2d at 183.

We reject the underwriters' argument, based on *Travelers Ins. Co. v. Keeling*, 996 F.2d 1485 (2d Cir. 1993) (*Keeling*), that this court may review, under the collateral order doctrine, the district court's finding that the receivership's claims are not arbitrable because the underwriters' waived their right to remove.[11] In *Keeling*, the district court's remand order was based upon the defendant's waiver of the right of removal pursuant to a forum selection clause contained in reinsurance agreements. 996 F.2d at 1488 n. 2. Because remand was not based on a lack of subject matter jurisdiction, § 1447(d) did not

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[11] Again, we point out that the underwriters mischaracterize the district court's holding.

bar review. *Id.* By contrast, in the present case, the district court remanded, at least in part, for lack of subject matter jurisdiction, finding that the Convention did not apply to this case. Slip op. at 5. Once the district court determined that the Convention did not apply and therefore removal jurisdiction was lacking, there was no need to rule on the receivership's contention that the underwriters had contractually waived any removal rights. *See Mobil Corp. v. Abeille Gen. Ins. Co.*, 984 F.2d 664, 666 n. 3 (5th Cir. 1993) (district court's order remanding case for lack of subject matter jurisdiction and for waiver of right to remove is unreviewable under § 1447(d)). Because the district court remanded on the ground that it lacked removal jurisdiction, we lack jurisdiction to review the district court's finding that the underwriters waived their right of removal.

III. Conclusion

Accordingly, the appeal is dismissed pursuant to 28 U.S.C. § 1447(d) for lack of jurisdiction. We therefore do not consider any of the underwriters' arguments regarding the merits of the district court's decision to remand or the district court's denial of the underwriters' motion to stay the remand order pending appeal. The parties' various outstanding motions are denied as moot.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

[Filed June 5, 1996]

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

TRANSIT CASUALTY COMPANY IN RECEIVERSHIP, Plaintiff,	)	
vs.	)	Case No. 96-4173-CV-C-2
CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON WHO ARE MEMBERS OF SYNDICATE NO. 553, AS SUBSCRIBERS TO CONTRACTS OF REINSURANCE WITH TRANSIT CASUALTY COMPANY, et al., Defendants.	)	

ORDER

After careful consideration and oral argument on the issues now pending before the court, it is hereby

ORDERED that defendants' motions for a temporary restraining order and preliminary injunction are DENIED. It is further ORDERED that plaintiff's motion to remand the above-captioned action to the Circuit Court of Cole County, Missouri is GRANTED. A Memorandum Order reciting the court's rationale will follow on or before June 10, 1996. All other pending motions are denied as moot.

/s/ Fernando J. Gaitan, Jr.
United States District Judge

Dated: June 5, 1996
Kansas City, Missouri

APPENDIX C

[Filed June 10, 1996]

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

TRANSIT CASUALTY COMPANY IN RECEIVERSHIP, Plaintiff,	)	
vs.	)	Case No. 96-4173-CV-C-2
CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON WHO ARE MEMBERS OF SYNDICATE NO. 553, AS SUBSCRIBERS TO CONTRACTS OF REINSURANCE WITH TRANSIT CASUALTY COMPANY, et al., Defendants.	)	

MEMORANDUM OPINION AND ORDER

On June 5, 1996, this court denied defendants' motions for temporary restraining order and preliminary injunction. In addition, plaintiff's motion for remand was granted. Presently pending before this court is defendants' motion to stay the execution of the remand pending defendants' appeal of the Order.

Plaintiff in the present action is an insurance company which was organized and incorporated under the laws of Missouri in 1945. On December 3, 1985, the Circuit Court of Cole County Missouri (Receivership Court) declared Transit to be insolvent pursuant to Mo. Rev. Stat. § 375.660. The receiver is proceeding with the liquidation of the company and has approved certain claims on policies issued by Transit and reinsured by defendant.

Plaintiff originally filed its complaint in the Cole County Circuit court on February 21, 1996, alleging that defendant owes plaintiff $1,431,856.76 under three separate agreements which became effective December 1, 1978, January 1, 1981 and January 1, 1984. On May 6, 1996, defendant removed this case to compel plaintiff to arbitrate.

Defendants removed this lawsuit from state court pursuant to 9 U.S.C. § 205, Convention on Recognition and Enforcement of Foreign Arbitral Awards (Convention) which provides that

> [w]here the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending.

Defendant relies on an arbitration provision contained in the agreements entered into by defendant with plaintiff which provide

> Art. XXII - Arbitration Clause
>
> All disputes on differences arising out of this Agreement shall be submitted to the decision of two Arbitrators . . . and in the event of the Arbitrators failure to agree, to the decision of the Umpire to be chosen by the Arbitrators.

Plaintiff presents myriad reasons why the present action should be remanded back to state court. Section 1447(c) of Article 28 of the United States Code provides that "[i]f any time before final judgment it appears that

the district court lacks subject matter jurisdiction, the case shall be remanded." Based on the following discussion, plaintiff's motion to remand is granted.

Plaintiff opposes defendants' removal of the above-captioned action based on Mo. Rev. Stat. § 357.1188.1 which provides that once an order is issued appointing a liquidator for a domestic insurer, no action may be brought against the liquidator in law, equity or in arbitration and Mo. Rev. Stat. § 435.350 of Missouri's Uniform Arbitration Act, which provides that agreements to arbitrate disputes will be given effect with the exception of "contracts of insurance." As a general rule, the arbitration clauses contained in the reinsurance agreements at issue would be enforceable under the Convention and the Federal Arbitration Act and would preempt Missouri statutes under the supremacy clause. Congress, with the enactment of the McCarran-Ferguson Act, has created an exception to the usual rules of preemption which preserves state statutes enacted "for the purpose of regulating the business of insurance." 15 U.S.C. § 1012 (b).

The McCarran-Ferguson Act provides that "[n]o Act of Congress shall be construed to invalidate, impair or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance." 15 U.S.C. § 1012. To determine whether the Missouri state statutes are saved from preemption by the McCarran-Ferguson Act, courts must consider first, does the federal statute specifically relate to the business of insurance, second, was the state law at issue enacted for the purpose of regulating the business of insurance and third, does the application of the federal law invalidate, impair

or supersede the state law. *See United State Department of Treasury v. Fabe*, 508 U.S. 491 (1993).

In the present action, both parties agree that neither the Convention nor the Federal Arbitration Act specifically relate to the business of insurance. Thus, this requirement of the McCarran-Ferguson Act is satisfied.

Next, it must be determined whether the state statute at issue was enacted for the purpose of regulating the business of insurance. Defendants dispute, in the first instance, that the Missouri statutes cited by plaintiff are applicable to the contracts at issue in that the statutes were enacted after the effective date of the reinsurance agreements and that section 435.350 is inapplicable to contracts of reinsurance.

The court, however, finds section 435.350 of the Missouri Uniform Arbitration Act applicable to all agreements, the amendments to the 1978 contract bringing that agreement within the scope of the Act. *See Hefele v. Catanzaro*, 727 S.W.2d 475 (Mo. App. 1987). Furthermore, the court declines to make a distinction in this case between contracts of insurance and reinsurance. *See Mutual Reinsurance Bureau v. Great Plains Mutual Ins. Co., Inc.*, 969 F.2d 931 (10th Cir.), *cert. denied*, 506 U.S. 1001 (1992).[1]

In addition, the court finds that section 435.350 was enacted for the purpose of regulating the business of insurance in that the statute is "'aimed at protecting or regulating' the performance of an insurance contract."

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[1] The court additionally rejects defendants' contention that California law is applicable to one of the contracts at issue. *See Allendale Mutual Insurance Co. v. Melahn*, 773 F. Supp. 1283 (W.D. Mo. 1991).

Fabe, 508 U.S. at 505 (citing *Securities and Exchange Comm'n v. National Securities*, 393 U.S. 453, 460 (1969)). *See also Mutual Reinsurance Bureau v. Great Plains Mutual Ins. Co., Inc.*, 969 F.2d at 932-33 (finding that a similar Kansas statute which expressly invalidated an arbitration agreement contained in the insurance contract touched the "core" of the business of insurance and holding that the Kansas statute placed limited on the enforceability of an agreement to spread risk).

Finally, the court finds that the application of the federal statute which would enforce the arbitration agreement contained in the reinsurance contracts would "impair, invalidate and supersede" the Missouri statute which expressly proscribes the enforcement of arbitration provisions contained in contracts of reinsurance. Defendants rely on the decision in *Ainsworth v. Allstate Insurance Co.*, 634 F. Supp. 52 (W.D.Mo. 1985), for the proposition that application of the FAA will not impair plaintiff's "substantive" remedy under Missouri law but would merely require the receiver to seek that relief through arbitration. *Id.* at 57. It is important to note, however, that the court found that plaintiff could not point to any provisions in the Missouri Insurance Code which would prohibit the arbitration of disputes under the circumstances. *Id.*[2] The court failed to consider the application of Missouri's Arbitration Act which did not apply retroac-

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[2] It appears that the court felt the presence of such a provision may have necessitated a different result. *Id.* (citing *Bernstein v. Centaur Insurance Co.*, 606 F. Supp. 98, 101-102 (S.D.N.Y. 1984) (holding that if New York had a law which specifically prohibited arbitration in disputes involving the insurance business, arbitration may be precluded)).

tively to the contracts at issue in the case. *Id.* at 56-57. In the present action, there clearly exists a state statute which precludes the enforcement of arbitration in insurance contracts.

Plaintiff additionally argues that defendants have waived their right to remove this cause of action by reason of the service-of-suit clauses contained in the Reinsurance Agreements between the parties. The language of the contract provides

> Art. XVII - Service of Suit Clause
>
> In the event of the failure of the Reinsurer to pay an amount claimed to be due hereunder, the Reinsurer will, at the request of the Reinsured, submit to the jurisdiction of any court of competent jurisdiction within the United States and will comply with all requirements necessary to give such court jurisdiction and all matters shall be determined with the law and practice of such court. In any suit instituted against the Reinsurer under this Agreement the Reinsurer will abide by the final decision of such court or of any reviewing court.

As a matter of contract interpretation, this court has determined that the legal effect of the clause contained in the reinsurance agreements at issue is to waive defendants right to remove. Certainly, the right to remove may be waived. *Foster v. Chesapeake Ins. Co., Ltd.*, 933 F.2d 1207, 1216 (3d Cir.), *cert. denied*, 502 U.S. 908 (1991). Moreover, there does not exist anything in the Convention Act's legislative history to suggest that Congress intended to accord a nonwaivable removal right to Convention defendants. *McDermott International, Inc. v. Lloyds Underwriters of London*, 944 F.2d 1199, 1209 (5th Cir. 1991).

The language of the service-of-suit clause suggests that by consenting to "submit" to "*any court* of competent jurisdiction *at the request of the reinsured*," defendant agreed to "go to, *and stay in*, the forum chosen" by Transit. *Foster v. Chesapeake Ins. Co., Ltd.*, 933 F.2d at 1217. This is supported by additional language which provides that "all matters shall be determined with the law and practice of *such* court" and that the reinsurer will "abide by the final decision of *such* court," *such* court referring to the court to which defendant agreed to submit at the request of plaintiff, in this case, the Circuit Court of Cole County, Missouri. *Id.*

As plaintiff correctly notes, many courts have held that a service of suit clause identical to the one at issue in the present action waives defendant's privilege of removal. *General Phoenix Corp. v. Maylon*, 88 F. Supp. 502, 503 (S.D.N.Y. 1949); *Foster v. Chesapeake Ins. Co.*, 933 F.2d 1207, 1216-18 (3d Cir. 1991); *City of Rose v. Nutmeg*, 931 F.2d 13, 16 (5th Cir. 1991); *Wellborn v. Classic Syndicate, Inc.*, 1992 WL 358104 (W.D.N.C. Nov. 25, 1992) (holding that a service of suit clause waived defendant's removal rights, even though the contract also contained an arbitration clause); *Travelers Insurance Company v. Keeling*, 1993 WL 18909, at *3 (S.D.N.Y. 1993) (see cases cited therein).

Defendants rely on the Fifth Circuit case of *McDermott Int'l, Inc. v. Lloyd's Underwriters of London*, 944 F.2d 1199 (5th Cir. 1991), in which the court found that the presence of a service of suit clause coupled with an arbitration clause rendered the former ambiguous. Because of the ambiguity, the court found that a waiver of the right of removal must be "clear and unequivocal" if the contract falls under the Convention Act. *Id.* at 1204-05.

The court finds persuasive, however, the analysis espoused in *Keeling*, *supra*, which found that "[w]here two seemingly conflicting contract provisions reasonably can be reconciled, a court is required to do so and to give both effect." *Id.* at *4 (citations omitted). Thus, giving both provisions equal effect, a reasonable reading of the contract would require defendants to submit to the jurisdiction of any court of competent jurisdiction chosen by plaintiff, whether it be to determine the arbitrable nature of the dispute, to confirm an arbitration award, to compel arbitration, or to resolve on the merits a claim not subject to arbitration. *Id.* Although the court is aware of the importance of the Convention and the policy concerns expressed in *McDermott*, the court is equally aware of the strong federal policy of deferring to state regulation of the insurance industry as exhibited in the McCarran-Ferguson Act, 15 U.S.C. § 1012. *See also Department of Treasury v. Fabe*, 508 U.S. 491 (1993).

Based on the above discussion, the court finds it appropriate to remand the above-captioned action back to the Circuit Court of Cole County, Missouri. In addition, it is hereby

ORDERED that defendants' motion to stay the execution of the Order remanding this action back to state court is DENIED.

/s/ Fernando J. Gaitan, Jr.
United States District Judge

Dated: June 10, 1996
Kansas City, Missouri

APPENDIX D

EXCERPT FROM THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, *reprinted following* 9 U.S.C.A. § 201

* * *

Article II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

* * *

APPENDIX E

PERTINENT STATUTES

9 U.S.C.A. § 202

§ 202. Agreement or award falling under the Convention

An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.

9 U.S.C.A. § 203

§ 203. Jurisdiction; amount in controversy

An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States (including the courts enumerated in section 460 of title 28) shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy.

9 U.S.C.A. § 205

§ 205. Removal of cases from State courts

Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending. The procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal. For the purposes of Chapter 1 of this title any action or proceeding removed under this section shall be deemed to have been brought in the district court to which it is removed.